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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 574

STATE OF TEXAS EX REL
PAN AMERICAN PRODUCTION CO., ET AL.,
Appellants,

v.

CITY OF TEXAS CITY, TEXAS, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION OF APPELLEE CITY OF TEXAS CITY, TEXAS TO DISMISS

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INDEX

	PAGE
Motion to Dismiss	1
Brief in Support of Motion	3
Opinions Below	3
Constitutional Provisions; Provisions of Texas Statute and City Charter; and Ordinance Involved	4
Statement of the Case	4
The Federal Questions Presented Are Not Substantial	8
I. The Annexation Ordinance, a Legislative Act, is immune from judicial review because it is a political act, and a court may not question it unless such act is palpably arbitrary and a plain abuse of power	9
(a) The Annexation Ordinance of a Home Rule City in Texas is a legislative act, political in nature	9
(b) The Ordinance, as a legislative act concerning boundaries, political in nature, is immune from judicial review and a court may not question it unless the act is palpably arbitrary and a plain abuse of power	9
II. The Annexation Ordinance is not palpably arbitrary and a plain abuse of power	13
(a) The political act of designation of local government boundaries is not palpably arbitrary and a plain abuse of power unless no benefits *can* result to annexed territory	13
(b) The inclusion of Appellants' mineral leases in the city limits of the City of Texas City can and has confefred benefits on Appellants and their property	15
III. The rule of the Myles Salt Company case is applicable only to taxing units of limited powers, created to effect special improvements, and is not applicable to Texas City, a city of general powers	21
Conclusion	27
Service of Process	29
Appendix A	A-1
Appendix B	B-1

PAGE

LIST OF AUTHORITIES

Constitutional Provisions, Statutes and City Charter

Constitution of the United States, 14th Amendment.....8, 9, 12
Texas Constitution, Art. VIII, Section 1..... 6
Texas Constitution, Art. XI, Section 5.....5, 11, 12
Art. 1175-2, revised Civil Statutes of Texas..... 5, 16
Charter, City of Texas City, Art. I, Section 4-C..... 5
Charter, City of Texas City, Art. XII, XIII, XIV..... 17

Cases

Branson v. Bush, 251 U.S. 182, 190 (1919) 26
Breiholz v. Board of Supervisors of Pocohontas County, 257 U.S. 120, 123 (1921) 25
Carmichael v. Southern Coal Co., 301, U.S. 495, 522 (1936) 14
City of Gladewater v. State, 138 Tex. 173, 157 S.W. 2d 641 (Tex. Comm. App. 1941) 10
City of Houston v. State, 142 Tex. 190, 176, S.W. 2d 928 (1943) 12
City of Pelly v. Harris County Water Control and Improvement District, 145 Tex. 443, 198 S.W. 2d 450 (1947) 16
Dalehite v. United States, 346 U.S. 15 (1953) 18
Dallas County Water Control District v. City of Dallas, 149 Tex. 362, 233 S.W. 2d 291 (1950) 12
Embree v. Kansas City & Liberty Blvd. Road District, 240 U.S. 242, 251 (1916) 26
Forsyth v. City of Hammond, 166 U.S. 506 (1896)..... 11, 21
Georgia Ry. & Electric Co. v. City of Decatur, 295 U.S. 165, 170 (1935) 26
Hancock v. City of Muskogee, 250 U.S. 254 (1919) 26
Houston v. Little River District, 239 U.S. 254 (1915)..... 13
Kansas City S. R. Co. v. Road Improvement District 3, 266 U.S. 380, 386 (1924) 22, 26
Kelly v. City of Pittsburgh, 104 U.S. 78, 80 (1881) 10, 11, 17, 19, 21, 25
Lake Shore & Michigan S. Ry. Co. v. Clough, 242 U.S. 376, 381 (1917) 25

PAGE

Miller v. Sacramento & San Joaquin Drainage District, 256 U.S. 129, 131 (1921) 25

Missouri Pac. R. R. v. Road District, 266 U.S. 198, 190 (1924) 14

Mount Saint Mary's Cemetery Assoc. v. Mullins, 248 U.S. 501, 505 (1919) 26

Morton Salt Co. v. City of South Hutchinson, 177 F. 2d 889, 891-92 (10th Cir. 1949) 17, 23, 24

Myles Salt Co. v. Board of Commissioners, 239 U.S. 478 (1916) 12, 13, 14, 15, 20, 21, 22, 23, 24, 25

Nashville, C. & St. L. R. Co. v. Walters, 294 U.S. 412, 429-30 (1935) 26

Norris v. City of Waco, 57 Tex. 635, 641 9

Saunders v. Shaw, 244 U.S. 316, 319 (1917) 25

St. Louis & K. C. Land Company v. Kansas City, 241 U.S. 419, 430 (1916) 26

State v. LaMarque Independent School District, 258 S.W. 2d 384 (Tex. Civ. App. 1953) 6

State ex rel Pan American Production Co. v. Texas City 295 S.W. 2d 677 (Tex. Civ. App. 1956) 3, 4, 8, 17

State ex rel Pan American Production Co. 303 S.W. 2d 780 (1957) 3, 4, 6, 8, 9, 16, 20, 23

Thomas v. Gay, 169 U.S. 264, 278 (1897) 14, 18, 19

Thompson v. Consol. Gas Utilities Corp., 300 U.S. 55, 80 (1937) 26

Union Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905) 14

Valley Farms Co. of Yonkers v. Westchester County, 261 U.S. 155, 162 (1923) 26

Wagner v. Baltimore, 239 U.S. 207 (1915) 13

Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) 13, 15

Other Authorities

37 Am. Jur. 645, Sec. 28-29 21

II McQuillin, Municipal Corporations, Sec. 7-10, pp. 277-282 9

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ON APPEAL FROM THE SUPREME COURT OF TEXAS

Motion of Appellee City of Texas City, Texas to Dismiss

Appellee City of Texas City, Texas, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above-entitled case on the ground that the appeal does not present a substantial federal question.

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No. 574

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

Brief in Support of Attached, Preceding Motion of Appellee City of Texas City, Texas to Dismiss

The City of Texas City, Texas, Appellee in the above-styled cause, by and through its attorney of record, respectfully submits this brief, pursuant to Rules 16 and 35 of the Revised Rules of this Court, in support of the attached, preceding Motion to Dismiss.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Texas are not yet officially reported, but may be found at 303 S.W. 2d 780. The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas is reported at 295 S.W. 2d 697. The judgment of the Tenth Judicial District Court of Galveston, Texas, is not reported. Attached hereto as Appendix A are copies of the majority and dissenting opinions of the Supreme Court of Texas, the opinion of the Court of Civil Appeals and the Judgment of the District Court.

CONSTITUTIONAL PROVISIONS; PROVISIONS OF TEXAS STATUTE AND CITY CHARTER; AND ORDINANCE INVOLVED.

Set forth in Appendix B hereto are the following: the Fourteenth Amendment to the Constitution of the United States; Article XI, Section 5 of the Constitution of Texas; Article 1175, Section 2, Vernon's Revised Civil Statutes of Texas; Article I, Section 4, Subsections C and E of the City Charter of the City of Texas City, Texas, adopted February 16, 1946; and the ordinance of the City of Texas City, Texas, adopted November 12, 1954, and recorded in Ordinance Book V at page 70 et seq., Ordinances of the City of Texas City, Texas.

STATEMENT OF THE CASE

The case under consideration is an appeal from a final judgment and decision of the Supreme Court of Texas which affirmed the judgment of the trial court, the Tenth Judicial District Court, and the intermediate appellate court, the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston.

At issue was the validity of the annexation ordinance enacted by the City of Texas City in so far as the boundaries set out in said ordinance embrace the oil and gas leases of Appellants in the submerged lands of Moses Lake and Dollar Bay. It is before this Court because Appellants contend that as to them, the annexation ordinance, a legislative act in Texas, violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

This suit was brought by the State of Texas, acting through the District Attorney of Galveston County, Texas,

in the nature of a *quo warranto* proceeding upon the relation of Pan American Production Company, Sun Oil Company, Freeport Sulphur Company, John W. Mecom and Radford Byerly, Trustee of the Mecom Trust, to set aside as unconstitutional an ordinance of the City of Texas City, Texas, annexing land in which the Relators-Appellants owned mineral leases and to enjoin enforcement of such ordinance, in so far as it affects land leased by Relators-Appellants.

The Texas Constitution, in Article XI, Section 5 (the so-called Home Rule Amendment), confers on cities of over 5,000 inhabitants the power to adopt or amend their charters subject to such limitation as may be prescribed by the Texas Legislature. Article 1175-2, of the Revised Civil Statutes of Texas, recognizes the power of such cities to provide in their charters the rules for annexing additional territory lying adjacent to such cities. The method of annexation by ordinance under the Texas Constitution and statutes has been recognized as valid under the Texas cases and available to Home Rule Cities since 1912.

The City of Texas City is a Home Rule City whose charter permits the City Commission to annex territory adjacent to its city limits by ordinance. (Plaintiffs' Exhibit 3, Charter, City of Texas City, Art. I, Sec. 4C; S.F. 11).

On November 12, 1954, the City Commission of the City of Texas City enacted an ordinance annexing approximately 5,539 acres of territory, including approximately 2,011 acres of submerged land underlying Moses Lake and Dollar Bay. (Stipulation, Par. 10, S.F. 7). Within these submerged lands, Appellants own mineral leases of approximately 1,343 acres. (Petition, Par. IV, Tr. 4-7.)

The majority opinion in the Supreme Court of Texas sets forth in succinct detail some of the *undisputed facts** in

* All emphasis in this brief is supplied, unless otherwise indicated.

this case. On pages 781 and 784 of 303 S.W. 2d Reporter, the Court's opinion reports the following facts:

> "The annexation ordinance embraced approximately 3,500 acres of upland and some 2,000 acres of submerged land underlying the two bodies of water, all immediately north of the existing city limits. Moses Lake and Dollar Bay are tidal waters and extend inland from Galveston Bay. Actually they constitute one body with arms extended on either side of a short blunt peninsula. The submerged lands are the property of the State of Texas, subject to oil and gas leasehold estates of the relators purchased on bid from the State.
>
> ". . . Moses Lake and Dollar Bay are landlocked except for a rather narrow passage into Galveston Bay. The area embraced within the annexation ordinance including the submerged land, was not only adjacent in the sense of 'neighboring' and 'close by' but was contiguous to the existing city limits. The northern boundary line of the city limits before annexation formed a common boundary line with the area sought to be annexed. Moses Lake and Dollar Bay are surrounded on the *north, east* and *south* by upland included within the annexation ordinance and the total area at its outer edge was from two to three miles distant from the city limits prior to the adoption of the ordinance."

A further fact which this Court will notice is that Moses Lake and Dollar Bay were held in *State* v. *LaMarque Independent School District*, 258 S.W. 2d 384 (Tex. Civ. App. 1953), to be properly a part of the Dickinson Independent School District. Although it is not a part of the record, it is presumed here that Appellants are paying ad valorem taxes to the school district. Tex. Const. Art. VIII, Sec. 1.

As Appellants' Jurisdictional Statement on page four states, "Relators have completed twenty-one oil wells in this water area, all but two of which were directionally drilled

from shore locations." One of the twenty-one (21) oil wells completed by Appellants is a vertically drilled oil and gas well from a location within Moses Lake and is commercially productive, and this well is equipped with Christmas Tree and Well Head Connections; and nineteen (19) of these wells were drilled directionally from shore locations (S.F. 26; Appellants' Jurisdictional Statement, p. 4).

Upon the passage of the annexation ordinance, Appellants requested the City Commission of Texas City to disannex their property in the water area, but the request was refused by the City Commission in the exercise of their discretion and judgment under the legislative power they possess.

Thereafter, at the request of Relators-Appellants this suit was filed. The trial petition of Appellants alleged that the water area had no reasonable relation to and was unsuited for municipal needs and purposes, that the city intended to render no municipal services to Appellants' property but had effected the annexation for the sole purpose of mulcting additional taxes from the mineral leasehold estates of Relators-Appellants in the area, with no benefit to them. Appellants prayed that the ordinance be declared void as to the area covered by their mineral leases in the water area and that the city be enjoined from acting under it.

Appellees leveled a number of special exceptions to the pleadings of the Appellants in the trial court. The position of Appellees was and is that the pleadings to which special exceptions were sustained are not material and therefore properly stricken, because what property can be annexed by a municipal corporation presents a question essentially political, which by the Home Rule Amendment to the Texas Constitution is to be determined by the legislative act of the Home Rule City. Further, many of the allegations contained in Appellants' Original Petition, stricken by special exceptions, are not factual at all, but rather represent con-

clusions drawn by them. This is true, Appellees contend, because the undisputed facts show that Appellants are receiving and will continue to receive benefits from the City of Texas City, among which benefits are fire and police protection to their property and employees.

Appellants declined to amend their petition after the trial court sustained the special exceptions lodged by Appellees, and judgment was for Appellees.

The Court of Civil Appeals (an intermediate appellate court in Texas) affirmed the trial court. The Supreme Court of Texas in reviewing the case, by a five to four decision, sustained the ordinance of the City of Texas City and held that the ordinance was validly within the legislative powers of the City Commission. The dissenting opinion would have remanded the cause back to the courts below for development of the alleged facts. On motion for rehearing, the Supreme Court of Texas denied the motion, thereby affirming their decision for Appellees.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The questions presented by this appeal are:

1. Is the legislative act of annexation by the municipal corporation of Texas City, Texas, created by the State of Texas, immune from judicial review when attacked on the grounds that such act violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, unless such legislative act is palpably arbitrary and a plain abuse of power?

2. Is the legislative act of annexation by the municipal corporation of Texas City, Texas, created by the State of Texas, violative of the due process and equal protection

clauses of the Fourteenth Amendment to the Constitution of the United States, when the undisputed facts show that such legislative act is not palpably arbitrary and a plain abuse of power, in that there is some relation between the territory annexed and the annexing city, and that some benefits *can* be (and have been) conferred on the annexed territory?

3. Are not previous decisions of this Court relating to special improvement districts of limited purposes and powers distinguishable from this case which concerns a city whose jurisdiction and powers are general?

I. The Annexation Ordinance, a Legislative Act, is immune from judicial review because it is a political act, and a court may not question it unless such act is palpably arbitrary and a plain abuse of power.

(a) The Annexation Ordinance of a Home Rule City in Texas is a legislative act, political in nature.

The act of a legislature in changing the boundaries of a local governmental unit traditionally has been considered a purely political matter. Such an act is regarded as a discretionary legislative prerogative, and generally cannot be subjected to review by the judicial branch of government. *II McQuillin, Municipal Corporations,* Sec. 7-10, pp. 277-282.

As pointed out in the Supreme Court of Texas majority opinion, the Supreme Court of Texas has long adhered to this view of legislative power over municipal corporations and their boundaries. In 1882 that Court said in *Norris v. City of Waco,* 57 Tex. 635, 641 that

> "... what property shall be embraced within a municipal corporation, and whether the same shall be taxed for municipal purposes, presents questions essentially

political, which by the constitution are to be determined by the legislature, and an assumption by the judiciary of power to revise the action of the legislature in such respect would be a usurpation."

See also *City of Gladewater* v. *State*, 138 Tex. 173, 157 S.W. 2d 641 (Tex. Comm. App. 1941).

The Supreme Court of the United States has also recognized the doctrine that determination of territory to be included in local government units is a local political matter exclusively within the province of the legislature.

In *Kelly* v. *City of Pittsburgh*, 104 U.S. 78, 80, (1881), the owner of eighty acres of farm land attacked the validity of taxes assessed by the City of Pittsburgh. His farm had been included within the city's boundaries by an act of the Pennsylvania Legislature. This Court said:

> "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation . . .
>
> " . . .
>
> "It is no part of our duty to inquire into the grounds on which those courts have so decided. *They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States.*"

And at page 82:

> "It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax

bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount . . .

"We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The waterworks will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools . . .

". . .

"Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payer without due process of law."

In *Forsyth* v. *City of Hammond,* 166 U.S. 506 (1896), seven hundred twenty-five acres of the plaintiff's land had been included in the limits of the City of Hammond. The Plaintiff had alleged that the land was used solely for agricultural purposes and that the Plaintiff's land could not benefit from being included in the city. The Court, citing *Kelly* v. *City of Pittsburgh, supra,* held that the matter of city boundaries is a local question, and that as a rule the legislative determination was final and absolute.

In 1912, Home Rule Cities, by virtue of the Home Rule Amendment to the Texas Constitution received the broad power of adopting their own charters, except as limited by the general law. This amendment to the Texas Constitution had the effect of conferring on such cities *all* the powers formerly held by the Legislature, except as expressly

limited. *Dallas County Water Control District* v. *City of Dallas*, 149 Tex. 362, 233 S.W. 2d 291 (1950).

Therefore the same dignity is now accorded the exercise of such power by a Home Rule City as was accorded the legislature's acts prior to the Home Rule Amendment. The power of annexation by a Home Rule City may be exercised by ordinance. *City of Houston* v. *State*, 142 Tex. 190, 176, S.W. 2d 928 (1943). The only limitation imposed by the legislature is that the territory annexed be adjacent to the city (Art. 1175, Subsec. 2, Revised Civil Statutes of Texas) and is not involved in this appeal.

(b) The Ordinance, as a legislative act concerning boundaries, political in nature, is immune from judicial review and a court may not question it unless the act is palpably arbitrary and a plain abuse of power.

What is the scope of judicial review of a legislative act, political in nature, when such act is attacked on the basis that it violates the Fourteenth Amendment to the Constitution of the United States? It is submitted that only where such legislative act is palpably arbitrary and a plain abuse of power may a court question it.

The Supreme Court said in *Myles Salt Co.* v. *Board of Commissioners*, 239, U.S. 478 (1916) at page 481:

> "There is no doubt that the legislature of a State may constitute drainage districts and define their boundaries or may delegate such authority to local administrative bodies, as, in the present case, to the Police Juries of the parishes of the State, and that their action cannot be assailed under the Fourteenth Amendment unless it it palpably arbitrary and a plain abuse."

After discussing the allegations of the plaintiff, the Court concluded at 239 U.S. 485:

> "It is to be remembered that a drainage district has the special purpose of the improvement of particular

> property and when it is so formed to include property which *is not* and *cannot be benefited* directly or indirectly, including it *only* that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation."

In the same term the Court had previously considered the validity of legislative acts fixing boundaries of tax districts and setting taxes, and had concluded that they were valid unless "palpably arbitrary and a plain abuse." *Houck* v. *Little River District*, 239 U.S. 254 (1915); *Wagner* v. *Baltimore*, 239 U.S. 207 (1915); see also *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940).

It is clear that the legislative act of a Home Rule City in annexing territory is reviewable only if it can be shown to be palpably arbitrary and an abuse of power.

II. The Annexation Ordinance is not palpably arbitrary and a plain abuse of power.

> (a) The political act of designation of local government boundaries is not palpably arbitrary and a plain abuse of power unless no benefits *can* result to annexed territory.

The attack on the annexation ordinance is, basically, that Appellants' oil and gas leases will be subjected to taxes without compensating benefits if Moses Lake and Dollar Bay are included in the city limits of Texas City.

It is notable that Appellants make no contention that such taxes as will be imposed on their mineral leases are for other than public purposes, or that such taxes lack constitutional validity on matters of assessment, notice and hearing. The sole attack on the annexation ordinance is related to the proposition that annexation means taxation allegedly without benefits to Appellants.

In discussing the validity of taxes, the United States Supreme Court said, in *Union Transit Co.* v. *Kentucky*, 199 U.S. 194, 202 (1905), that the power of taxation rests on the assumption of some benefit conferred on the taxpayer. But the benefit furnished need not be equal in value to taxes imposed, nor need the benefit be to all equally. The Court, in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 522, (1936), said:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes . . ."

See also *Missouri Pac. R. R.* v. *Road District*, 266 U.S. 198, 190 (1924).

And in *Thomas* v. *Gay*, 169 U.S. 264, 278 (1897), the Court said:

> "The cases, both state and Federal, are numerous in which it has been held that taxes, otherwise lawful, are not invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared."

Under the above authorities it is clear that a legislative act of annexation of territory to a local government, whether considered alone or as the equivalent of imposing a tax on such territory is not subject to review unless it is palpably arbitrary and a plain abuse of power. The cases cited also demonstrate that it is not such an abuse of power unless absolutely *no benefits*, tangible or intangible, *can* accrue to the owner or his property from the taxing authority. In the *Myles Salt* case, *supra*, no benefits could accrue to the Salt Company because its land was of

a nature which could not be benefited by the exercise of the *limited powers* of the drainage district. In *Wisconsin* v. *J. C. Penney Co., supra,* no benefit was possible because the transactions taxed were outside the state; in *Union Transit Co.* v. *Kentucky, supra,* the property to be taxed was outside the state, and no benefit could accrue to it or to its owner. In all these cases no benefit could accrue to the owner because it was beyond the *power* of the taxing authority to confer any such benefits. See quotation from the *Myles Salt* case, *supra,* set forth in this brief at page 13. It is submitted that only if it is beyond the *power* of the City of Texas City to extend any benefits to Appellants will the ordinance in question be subject to review.

(b) The inclusion of Appellants' mineral leases in the city limits of the City of Texas City can and has conferred benefits on Appellants and their property.

The Appellants alleged in their Original Petition that the Moses Lake-Dollar Bay area of state-owned lands had no reasonable relation to and was unsuited for municipal needs and purposes, that the city intended to render no municipal services to the area but had effected the annexation for the sole purpose of mulcting additional taxes from the mineral leasehold estates of Appellants. (See Appellant's Jurisdictional Statement, page 5.)

The allegations were stricken on special exception by Appellee, and no evidence was received on them. The "facts" in the allegations are actually conclusions of the pleader. The question as to whether a certain area is "unsuited for municipal needs" and "that the city intended to render no municipal services to the area" are conclusions. The *undisputed facts* as to the annexed territory's common boundary with the city, and as to the areas annexed, the area submerged and the acreage under lease, and as to the oil wells which have been drilled vertically and from the

shore, have been set forth in the Statement of the Case, *supra*.

It is submitted that Appellants' allegations, largely conclusions of the pleader, do not have to be accepted as true. Should the court desire to consider these allegations, even where the allegation is contrary to common knowledge and facts of which the court may take judicial notice, the cases involving annexations by cities are replete with instances where the courts have taken notice of such facts or benefits and intangible benefits as may result to them from the preservation of order and protection of property. As the majority opinion in this case in the Supreme Court of Texas, on page 783 of 303 S.W. 2d Reporter, states:

> ". . . not only can there not be equality of benefits to the individual taxpayers, but some may not receive any benefit at all, except such intangible benefits as may result to them from the preservation of order and protection of property. Surely it cannot be said that even though petitioners' properties lie wholly within these submerged lands, there would never be an occasion when they would not need to call upon the municipal authorities for police or fire protection and even though they allege that the city has no present intention of furnishing any such services this is not to say that having been incorporated into the city limits they would not be entitled to and could not rightfully demand such protection."

As a Home Rule City, the City of Texas City has broad statutory police powers to protect and promote the public health and general welfare. *City of Pelly* v. *Harris County Water Control and Improvement District*, 145 Tex. 443, 198 S.W. 2d 450 (1947); Art. 1175, Revised Civil Statutes of Texas.

The intangibles of being included in an organized community, of preservation of law and order and protection

of property are in themselves benefits in the constitutional sense. *Morton Salt Company* v. *City of South Hutchinson*, quoted *infra*. See also *Kelly* v. *Pittsburgh, supra*. Indeed, it is difficult to imagine a situation where a property owner could receive no benefits from being included in a Home Rule City of *general powers*, on which he would be entitled to call for protection and services. See the Court of Civil Appeals opinion in this case, 295 S.W. 2d, 697, at page 705, where Justice Gannon discusses the benefits, present and future, to this territory as a result of the annexation. But it is not necessary to rest the case on this base. Counsel for Texas City submits that in the case at bar Appellants have received and will continue to receive tangible benefits by the annexation of their property, regardless of allegations to the contrary.

The City of Texas City has an active fire department, police department and health department (S.F. 10, Charter, Art. XII, XIII and XIV). The facts show a producing oil and gas well in a surface location on Moses Lake (S.F. 26). The Court judicially knows that oil and gas are highly inflammable. Since oil and gas are inflammable, a fire might result from their well or other wells which Appellants or *others* might later drill. The fire and police facilities of Texas City would be useful in such emergency in safeguarding the lives of Appellants' employees and in the protection and conservation of Appellants' property. Indeed, such fire and police protection has been available to protect Appellants, their property and employees, from vandalism, theft, riots, or other unlawful acts.

Appellants here contend that only the 2,011 acres of water area of the 5,539 acres annexed by the ordinance is unsuitable for municipal purposes, and Appellants have asked that the ordinance be declared void as to their mineral leases covering 1,343 acres within the water area, and that the

city be enjoined from acting under it. In the affording of services to and in the protection of the remaining 3,528 acres, particularly of the land area at the water's edge (nineteen of Appellees' wells have their surface connections on the shore, although the bottoms of the wells are under the water area), Appellants necessarily must reap tangible benefits which were not available to them before annexation. If Appellants are successful in having the Court declare the ordinance void as to the water area only, thus leaving the immediate surrounding land area within the city, they are in the position of having their cake and eating it as well. If successful, they will profit in a most tangible way in even closer supervision of police protection and fire fighting facilities than in the past and at the same time will not have to pay for such services and benefits.

Texas City was the scene of an explosion, one of the greatest civic disasters in recent American history, several years ago, and persons and property in the entire area, both inside and beyond the city limits, were placed in jeopardy. *Dalehite v. United States*, 346 U.S. 15 (1953). Such emergencies, dangers, possibilities of riots, vandalism, and theft are present always in a highly industrialized section such as Texas City and its environs. The protection of police and fire departments then becomes even more graphically necessary than at normal times when such protection is beneficial also.

Even if Appellants have not made use of the street system of Texas City, undoubtedly these city streets would be more than welcome by Appellants in the event of any emergency, great or small.

Further, the maintenance of law and order, the promotion of health, and the improvement of streets and other public facilities in the adjoining area alone, is in itself a benefit to Appellants' property and employers. In *Thomas v. Gay*, *supra*, cattle located in an unorganized county were taxed,

under a Territorial statute, by an adjoining organized county, to which the unorganized county was attached for judicial purposes. In upholding the tax the Court said:

> "It is further contended that, while the taxes assessed for territorial and court expense funds may be valid, yet that the balance of the taxes, levied for county purposes and expended within the geographical limits of Kay County, are unauthorized, for the reason that the people on these reservations are not interested in such taxes, and receive no benefit from their expenditure. But, as it seems to us, it cannot be maintained that those plaintiffs whose cattle are within the protection of the laws of Oklahoma receive no benefit from the expenditures in Kay County. Certainly they have some advantage in the improvement of the roads within that county, when they journey to and from the towns and settlements in the organized county. They are interested in the prevalence of law and order in the communities adjacent to their property, and in the provision made for the care of the poor and insane. It is to be presumed that they have a right to send their children to the schools in the organized county."

See also *Kelly* v. *Pittsburgh*, quoted *supra*.

Regardless of what evidence the Appellants could have introduced, the above facts would sustain a conclusion that the owners of mineral leases in Moses Lake and Dollar Bay not only can, but have received and will receive benefits from the city.

As demonstrated in the foregoing authorities, only if a conclusion *cannot* be drawn from the above facts that some benefits can accrue to Appellants is the ordinance subject to judicial review.

It is not the pleader's conclusion of fact which governs, nor is it a jury's or a court's. The prerogative of weighing the facts belongs to the entity having legislative power —

in this case, the City of Texas City, Texas. It is submitted that on the above undisputed facts that the city's act of annexation was not palpably arbitrary and an abuse of power, and is not subject to judicial review.

It is to be noted that the Appellants' allegation of intent on the part of the city not to render services but merely to collect taxes from Appellants can have no bearing on the case. First, it is difficult to see how a municipal corporation can have any "intent." Second, any such intent is immaterial. In the *Myles Salt* case, the Court pointed out specifically that the basis of decision was *results* and not *intentions*. The question was one of an abuse of power. At 239 U.S. 485 the Court said:

> "... We are not dealing with *motives* alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of *power* determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others — *power*, therefore, *arbitrarily exerted*, imposing a burden *without* a *compensating advantage* of any kind."

Further, under the law in Texas, regardless of intention on the part of city officials, Appellants would be entitled to demand police and fire protection if their property is in the city's limits. Majority opinion of the Texas Supreme Court in this case at 303 S.W. 2d 783, quoted in this brief at page 16. Some remedy other than the one sought on this appeal would be appropriate if such benefits are denied them.

The argument in Appellants' Jurisdictional Statement (at page 17) relating to the equal protection clause of the Fourteenth Amendment is without merit. The contention there is that an unreasonable classification of land for taxation

exists because of inclusion of Moses Lake and Dollar Bay in the city limits of Texas City. This classification of property in the state is the prerogative of legislative power under authorities already cited. 37 *Am. Jur.* 645, Sec. 28-29. As discussed above this legislative prerogative of designation of what land is to be included in a taxing unit and what is to be excluded is reviewable only if it is palpably arbitrary and an abuse of power. *Kelly* v. *City of Pittsburgh, supra; Forsyth* v. *City of Hammond, supra; Myles Salt Company* v. *Board of Commissioners, supra.* It has been demonstrated that such is not the case with the annexation ordinance of Texas City.

III. The rule of the Myles Salt Company case is applicable only to taxing units of limited powers, created to effect special improvements, and is not applicable to Texas City, a city of general powers.

The bulk of Appellants' Jurisdictional Statement and the crux of the dissenting opinion in the Supreme Court of Texas concerns the holding of this Court in *Myles Salt Co.* v. *Board of Commissioners,* 239 U.S. 478 (1916). On eleven of the eighteen pages of Appellants' Jurisdictional Statement the decision in the *Myles Salt* case is discussed. Associate Justice Norvell of the Supreme Court of Texas, in his dissenting opinion, relies heavily on this case involving a Louisiana drainage district which encompassed Weeks Island on the Coast of Louisiana. This Court found that the legislative action of the police juries of Iberia and St. Mary parishes in creating a drainage district "was of *no benefit* to plaintiff's land and was formed *only* for the *benefit* of *other lands*" and was "arbitrary," "an abuse of power," and "an act of confiscation." The *Myles Salt* case thereby falls within the rule as stated by Mr. Justice Van Devanter,

in *Kansas City S. R. Co.* v. *Road Improvement District No. 3*, 266 U.S. 380, 386 (1924), as follows:

> "Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the 14th Amendment. (Citing cases, including the Myles Salt case.)

The property of the Myles Salt Company was an island surrounded on three sides by water and on the rear by a salt-water marsh. It rose abruptly 175 feet or more above the surrounding country outside of the sea marsh (which surrounding country reached a maximum elevation of only about 15 feet). The Court found that it could not be benefited directly or indirectly by a drainage district under the physical facts there and that the sole purposes was to derive taxes for the benefit of other lands.

The Court's opinion, on pages 482-483 of 239 U. S. Reports, reads as follows:

> "*Solely* with the view of deriving revenues from the assessment of Weeks Island and the salt deposit therein, and *only* for the *benefit of the other properties*, and not upon the theory that a general scheme of drainage would inure to the benefit of all of the property therein, *even indirectly*, and not through an exercise of sound and legal legislative discretion, the island was included within the confines of the district . . . .
>
> "*It was not intended nor has it ever been intended, nor was it possible nor is it possible*, to give *any* of the *benefits* of the drainage scheme to Weeks Island or to the salt deposit therein, *directly or indirectly*, its inclusion in the district being solely and only for the purpose of deriving revenue therefrom for the special benefit of the *other lands* subject to be improved by drainage, without any benefit to plaintiff or its property whatever. The island is the highest assessed piece of property in the district, and has never received one single

> cent of benefit from the drainage system constructed and maintained in such district, and *never can or will in the future* receive any benefit whatever from the system."

A drainage district's powers are designed statutorily for a specific or special purpose, and are limited powers, as compared to a city's powers which are general. Associate Justice Culver's majority opinion in this case before the Supreme Court of Texas makes this point in telling fashion on page 783 of 303 S.W. 2d Reporter:

> "In Tri-City Fresh Water Supply District v. Mann, 135 Tex. 280, 142 S.W. 2d 945, we pointed out that a district created for the purpose of conferring special benefits to its inhabitants does not have such powers as are granted by the Constitution and statutory enactments to cities and towns operating under home rule charters. The district is limited to such powers as are expressly delegated to it by the Legislature and by necessary implication."

It follows that the rule enunciated in the *Myles Salt* case would not apply to a city. This distinction between a drainage district of limited jurisdiction and purpose and a city of general jurisdiction is pointed out in *Morton Salt Co.* v. *City of South Hutchinson*, 177 F. 2d 889, 891 - 92 (10th Cir. 1949) as follows:

> " . . . there is a valid distinction between a special tax or assessment to finance special improvements designed to benefit property or persons located within a particular taxing district, and an ad valorem tax on all the property within the taxing jurisdiction for the general welfare of the whole community. Since the special tax is intended to confer a peculiar benefit upon members of a particular class organized for that purpose, the tax burden must bear some reasonable rela-

tionship to the intended benefits. (Citing cases, including the Myles Salt case.)

"When, however, the tax is levied upon all the property for public use, such as schools, the support of the poor, for police and fire protection, for health and sanitation, for waterworks and the like, the tax need not, and in fact seldom does, bear a just relationship to the benefits received. *Thus the property of a corporation may be taxed for the support of public schools, asylums, hospitals, and innumerable public purposes, although it is impossible for it to derive any benefits other than privileges which come from living in an organized community.* The benefits are intangible and incapable of pecuniary ascertainment, but it is constitutionally sufficient if the taxes are uniform and are for public purposes in which the whole city has an interest (citing cases including Kelly v. Pittsburgh, *supra*, Thomas v. Gay, *supra*, and Wisconsin v. J. C. Penney Co., *supra*).

"*. . . the tax is for a public purpose, and in so far as the corporation is concerned, the benefits to be derived are intangible and not susceptible of pecuniary evaluation, but are nonetheless very real in a constitutional sense.*"

In that case, Chief Judge Phillips, who stated that the opinion of the court had his full concurrence, pointed out that the company will receive benefits through the protection and improvement of the public health of inhabitants of the city, including employees of the company, and in other ways, citing at length *Kelly* v. *City of Pittsburgh*, *supra*.

The opinion in the *Myles Salt* case itself clearly shows that the case was for a special purpose for the improvement of particular property and is not applicable to the case at bar where a city with general powers to care for the general welfare of the whole community is involved. This court concluded its opinion in the *Myles Salt* case as follows:

"It is to be remembered that a drainage district has the *special* purpose of the improvement of *particular*

property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it *only* that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation."

Even if the City of Texas City were only a drainage district, instead of a city of some size and responsibility, in which case the *Myles Salt* case rule would have some application, it is submitted that there are not present the physical and geographical *undisputed facts* necessary to show a violation of Appellant's constitutional rights. Indeed, the *undisputed facts*, as set forth in the majority opinion in the Supreme Court of Texas, and in the opinion in the Court of Civil Appeals, and as discussed in this brief, indicate clearly the tangible and intangible benefits available to and received by the Appellants.

As already demonstrated, Appellants have a right to receive benefits which the City of Texas City has power to confer, and Appellants have received and will continue to receive such benefits.

A brief review of the cases of this Court which have cited the *Myles Salt* case illustrates that the rule in that case is limited to special improvement within a taxing district of limited powers and is not applicable to a city whose taxing jurisdiction is on all property by ad valorem taxes for the general welfare of the whole community, and whose powers are general.

This Court has on 14 occasions cited the *Myles Salt* case. Four of these cases involved drainage district assessments (*Saunders* v. *Shaw*, 244 U.S. 316, 319 (1917); *Lake Shore & Michigan S. Ry. Co.* v. *Clough*, 242 U.S. 376, 381 (1917); *Miller* v. *Sacramento & San Joaquin Drainage District*, 256 U.S. 129, 131 (1921); *Breiholz* v. *Board of Supervisors of Pocohontas County*, 257 U.S. 120, 123 (1921));

— three involved road improvement assessments or bonds (*Embree* v. *Kansas City & Liberty Blvd. Road District*, 240 U.S. 242, 251 (1916); *Branson* v. *Bush*, 251 U.S. 182, 190 (1919); *Kansas City So. Ry. Co.* v. *Road Improvement District No. 3 of Sevier County, Arkansas*, 266 U.S. 380, 386 (1924));

— one concerned a street widening assessment (*St. Louis & K. C. Land Company* v. *Kansas City*, 241 U.S. 419, 430 (1916));

— three involved sewer district assessments (*Mount Saint Mary's Cemetery Assoc.* v. *Mullins*, 248 U.S. 501, 505 (1919); *Hancock* v. *City of Muskogee*, 250 U.S. 254 (1919); *Valley Farms Co. of Yonkers* v. *Westchester County*, 261 U.S. 155, 162 (1923));

— one involved a street paving assessment (*Georgia Ry. & Electric Co.* v. *City of Decatur*, 295 U.S. 165, 170 (1935));

— one involved apportionment of cost of construction of a grade crossing (*Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 430 (1935));

— and one mentioned the *Myles Salt* case in a suit concerning a proration order of a state conservation agency (*Thompson* v. *Consol. Gas Utilities Corp.*, 300 U.S. 55, 80 (1937)).

Mr. Justice Brandeis in *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U.S. 412, 429-30 (1935), writing the Court's opinion, stated that

> "... While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment (citing cases); so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. (Citing cases including the *Myles Salt* case)."

It is submitted therefore that the *Myles Salt* case has no application to the City of Texas City, a city of general powers.

CONCLUSION

The annexation power of Home Rule Cities comes from the Constitution of Texas itself. The only limitation which has been imposed by the legislature on the power of any Texas Home Rule City to annex territory is the limitation that the territory annexed must be adjacent. The annexed territory, of which Moses Lake and Dollar Bay are but a part, adjoined the existing city limits of Texas City.

The City of Texas City, in the exercise of its legislative power, passed an ordinance which is not subject to judicial review on any of the grounds alleged by Appellants because these grounds do not raise material issues. Short of palpable abuse, concerning which the minds of reasonable men could not differ, the right to determine the wisdom and reasonableness of legislation lies exclusively in the legislative area, and such determination is not subject to review by the courts on any consideration of wisdom or policy, but only for palpable and arbitrary injustice.

Those who seek to establish the invalidity of such ordinances must overcome any state of facts which can be reasonably conceived to sustain it, and further must overcome facts which are judicially known and undisputed. This presumption cannot be rebutted on mere general conclusions of fact or of law alleged in a petition.

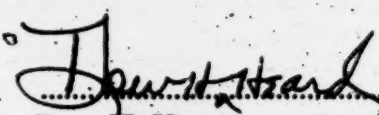
The federal courts have found that the requirement that benefits must be given by the city to the annexed area is satisfied by the intangible benefits received which come from living in an organized community. The benefits may be intangible and incapable of pecuniary ascertainment, but it is constitutionally sufficient if the taxes are uniform and are

for public purposes in which the whole city has an interest.

Texas City has general powers and benefits can be conferred on Appellants and their property.

Further, Appellants and their property since annexation have enjoyed and will continue to enjoy city protection of their employees and property from injury or loss by fire or other hazards such as vandalism, theft, and riots, these being tangible benefits received by Appellants. Especially is this true since no complaint is made by Appellants that whatever taxes will be collected from them will be spent for purposes other than public.

We respectfully submit, therefore, that the Appellants present no substantial federal question for the decision of this Court, and that the appeal should be dismissed.



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SERVICE OF PROCESS

I, Dow H. Heard, a member of the Bar of the Supreme Court of the United States, representing the Appellees herein, do hereby certify that this Motion to Dismiss has been served upon Appellants by depositing copies thereof in the United States mail in Houston, Texas, with first-class postage prepaid, addressed to Francis G. Coates, 1600 Esperson Building, Houston 2, Texas, counsel of record for Appellants, this 13th day of January, 1958.

Dow H. Heard

Dow H. Heard

APPENDIX A

IN THE

Supreme Court of Texas

No. A-6146

STATE OF TEXAS EX REL, PAN AMERICAN PRODUCTION CO., ET AL.,

Petitioners,

v.

CITY OF TEXAS CITY, TEXAS, ET AL.,

Respondents.

FROM GALVESTON COUNTY, FIRST DISTRICT.

This quo warranto proceeding, upon relation of Pan American Production Company and others, challenges the validity of a certain annexation ordinance enacted by the City Commission of the City of Texas City in so far as it includes submerged areas of Moses Lake and Dollar Bay. The trial court sustained exceptions to the petition and ordered dismissal. This judgment was affirmed. 295 S.W. 2d 697.

The annexation ordinance embraced approximately 3,500 acres of upland and some 2,000 acres of submerged land underlying the two bodies of water, all immediately north of the existing city limits. Moses Lake and Dollar Bay are tidal waters and extend inland from Galveston Bay. Actually they constitute one body with arms extended on either side of a short blunt peninsula. The submerged lands are the property of the State of Texas, subject to oil and gas leasehold estates of the relators purchased on bid from the State.

Petitioners assert that there are no inhabitants within the area in dispute nor is it fit or suitable for habitation; that there is no water-borne traffic through these waters and no need therein for municipal services such as police and fire protection; that the City has no good-faith intention of using the area for any municipal or city purposes, nor of furnishing to the area any of the facilities and services normally furnished by a municipal corporation within the area of its boundaries, but on the contrary seeks to annex this submerged land for the sole purpose of taxing relators' property and obtaining additional revenue for the operation of the City's functions without any compensation or expectation of any corresponding returns or benefits to them; that the area is not suitable or necessary for city purposes and entirely unrelated to any present or foreseeable future economic needs of the City; that the annexation of this territory is unreasonable, arbitrary, unjust and void and will have the effect of taking the relators' property by taxation without due process of law. The trial court sustained exceptions to these allegations on the theory that the action of a home rule city in extending its boundaries is not subject to judicial review. The Court also sustained an exception to the allegations that the annexation ordinance was unauthorized by law, unreasonable, arbitrary and unjust

on the ground that it was not supported by any allegation of fact. The trial court properly entered the order of dismissal and we affirm that judgment.

Article 11, Section 5 of the State Constitution confers upon cities of over 5,000 inhabitants the power to adopt or amend their charters subject to such limitations as may be prescribed by the Legislature. Among the enumerated powers granted to these cities by the Legislature is "The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter." Vernon's Ann. Stat., Art. 1175-2.

The only limitation fixed by the Legislature on the power of a city to annex additional territory is that the territory shall be *adjacent* to the city and not included within the boundaries of any other municipality. *City of Houston et al* v. *State ex rel City of West University Place*, 142 Tex. 190, 176 S.W. 2d 928.

In the *City of Gladewater* v. *State ex rel Walker*, 138 Tex. 173, 157 S.W. 2d 641, an annexation ordinance was assailed on substantially the same grounds as presented here. In that case the ordinance was enacted under the provisions of Art. 974g, Vernon's Ann. Civ. Stat., authorizing a city with a population of less than 5,000 to annex territory to the extent of one-half mile. We there reaffirmed the rule pronounced in *State* v. *City of Waxahachie*, 81 Tex. 626, 17 S.W. 348, namely: "* * * The Legislature having prescribed a certain limit to which the boundaries of a city may be extended, without expressing any qualifications, the right to so extend them results, without regard to the use or character of the occupation of the annexed territory. * * *."

Petitioners rely on that portion of the opinion in *City of Houston* v. *State ex rel City of West University Place*,

supra, (p. 931) where the Court implied that if the territory sought to be annexed by the City of Houston was so unrelated to the City's economic needs as to be wholly unreasonable and arbitrary the action would be subject to judicial review. That implied holding was not necessary to the decision. The Court had already stated the rule to be: "* * * This power of a Home Rule City to annex territory, being legislative power, is therefore not subject to being revised by the judicial power of the courts * * *", citing *Gladewater, Waxahachie* and *Norris* v. *City of Waco,* 57 Tex. 635. But at any rate the conclusion of the petitioners here that the annexation ordinance was unreasonable and arbitrary is only to say that it was unreasonable and arbitrary because the land was not suitable, and had no relation to the City's needs, and it was for the purpose only of acquiring additional revenue and could afford no benefit to the owners of the property annexed. The decisions of this State have repeatedly held that such facts do not warrant intervention or review by the courts. In the rather recent case of *State ex rel Graves* v. *City of Sulphur Springs,* Tex. Civ. App., 214 S.W. 2d 663, n.r.e., an annexation order of the City of Sulphur Springs was alleged to be unreasonable and arbitrary in that the territory sought to be annexed by the City was for the sole purpose of obtaining revenue for city purposes with no possible benefit to the inhabitants of the annexed territory; that it was a narrow strip two miles long and 800 feet wide and bore no relation to the present needs of the City or to its future growth. The Court of Civil Appeals, under the authority of *Waxahachie, Gladewater* and *City of Houston,* upheld the trial court's action in sustaining exceptions to those allegations and dismissing the suit. While the application for writ of error in that case was refused with the notation, "no reversible error," and for obvious reasons, the only point raised there

was the sufficiency of plaintiff's allegations. The decision, therefore, is as authoritative as though it had received our unqualified approval.

The constitutional inhibition against taking private property for public use without compensation has reference solely to the exercise of the right of eminent domain and not to taxation for public use. And although the latter may operate harshly or unjustly this fact affords no power to the court to interfere with the legislative process. *Norris v. City of Waco*, 57 Tex. 635. In that early case the Court said:

> "As to this the courts have the power to inquire, for it involves questions judicial in character; but what property shall be embraced within a municipal corporation; and whether the same shall be taxed for municipal purposes, presents questions essentially political, which by the constitution are to be determined by the legislature, and an assumption by the judiciary of power to revise the action of the legislature in such respect would be a usurpation."

The matter of the boundaries and extensions thereof and the legislative prerogative in that respect has been delegated by the Legislature to the cities operating under the home rule amendment. The Court went on to hold that, not only can there not be equality of benefits to the individual taxpayers, but some may not receive any benefit at all, except such intangible benefits as may result to them from the preservation of order and protection of property. Surely it cannot be said that, even though petitioners' properties lie wholly within these submerged lands, there would never be an occasion when they would not need to call upon the municipal authorities for police or fire protection and even though they allege that the city has no present intention of furnishing any such services this is not to say that

having been incorporated into the city limits they would not be entitled to and could not rightfully demand such protection.

In *Lenox Land Co.* v. *City of Oakdale,* 137 Ky. 484, 125 S.W. 1089, writ of cert. dismissed, 231 U.S. 739, 58 L. Ed. 461, the Court ruled:

> "* * * The extension or reduction of the boundaries of a city or town is held, without exception, to be purely a political matter, entirely within the power of the Legislature of the state to regulate. The established doctrine is that the state Legislature has the unlimited right to pass such laws for the annexation of territory to municipal corporations as in its judgment will best accomplish the desired end, and that a different method may be provided for each class. * * *."

Petitioners urge upon us the holding in *Myles Salt Co.* v. *Board of Commissioners,* 239 U.S. 478, 60 L. Ed. 393, where the Court decided that the property of Myles Salt Company, being an island and rising abruptly 175 feet or more above the surrounding marshy land, could not be benefited directly or indirectly by a drainage improvement and that to include this land within the drainage district solely for the purpose of deriving taxes for the benefit of other lands would be inconsistent with the due process clause of the 14th Amendment to the United States Constitution.

A valid distinction is to be made, however, between a special tax or assessment to finance special improvements designed to benefit property or persons located within the particular taxing district, and on the other hand an ad valorem tax on all property within the taxing jurisdiction of the general welfare of the entire community. Benefits may be intangible and incapable of exact ascertainment, but it is constitutionally sufficent if taxes are uniform and

are for public purposes in which the City has an interest. *Morton Salt Co.* v. *City of Hutchinson*, 177 F. 2d 889. In that case Chief Judge Phillips, in concurring, points to the fact that the company will receive indirect benefits through those conferred on company employees who reside within the city limits and in other ways. *Kelly* v. *City of Pittsburgh*, 104 U.S. 78, 26 L. Ed. 658.

In *Tri-City Fresh Water Supply District* v. *Mann*, 135 Tex. 280, 142 S.W. 2d 945, we pointed out that a district created for the purpose of conferring special benefits to its inhabitants does not have such powers as are granted by the Constitution and statutory enactments to cities and towns operating under home rule charters. The district is limited to such powers as are expressly delegated to it by the Legislature and by necessary implication.

The Supreme Court of the State of Florida in *State ex rel Davis* v. *City of Stuart*, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307, held invalid an Act of the Legislature abolishing the municipal government of the town of Stuart and establishing a new municipality by the same name, but with its boundaries extended so that the original area of the town was increased from about 640 acres to approximately 9400 acres, and including rural lands far removed and isolated from the town proper, saying that where the Act constitutes arbitrary, unreasonable and flagrant invasion of personal and property rights guaranteed by other provisions of the Constitution, the Act is subject to judicial review as any other class of legislation. At the same time the Court recognized (p. 341) that the weight of authority in this country seems to be to the contrary and that the legislative power in this regard is held generally to be, for practical purposes, plenary and unlimited in the absence of express constitutional restrictions.

A somewhat similar rule is announced in *State* v. *City of Joplin*, 332 Mo. 1193, 62 S.W. 2d 393, namely, that while the Court is without power to review the City's exercise of discretion in extending its boundary, it will, however, review the results of determining reasonableness, holding: "It was not for the trial court to decide whether, upon the facts shown to exist, the extension of the boundaries was necessary, but to determine whether or not, upon the facts shown to exist, reasonable men would differ as to the necessity of the extension."

While the arguments made in support of the positions taken by these two eminent courts are strongly persuasive and supported by cogent reasoning, we think they do not compel a reversal of the stand taken by our Court and adhered to over a long period of years.

Petitioners contend further that this submerged area is not subject to annexation because it is not "territory," nor "adjacent territory" nor "additional territory" within the meaning of Art. 1175-2.

The term "adjacent" is not a word of fixed or definite meaning. The authorities are almost unanimous in according to that term the meaning of "neighboring or close by" or "in the vicinity of and not necessarily contiguous or touching upon." The meaning is determined to some extent by the context or by the subject matter. *State* v. *Camper*, 261 S.W. 2d 465, wr. ref. See Words and Phrases, "Adjacent." Moses Lake and Dollar Bay are landlocked except for a rather narrow passage into Galveston Bay. The area embraced within the annexation ordinance including the submerged land, was not only adjacent in the sense of "neighboring" and "close by" but was contiguous to the existing city limits. The northern boundary line of the city limits before annexation formed a common boundary line with the area sought to be annexed. Moses Lake and Dollar

Bay are surrounded on the north, east and south by upland included within the annexation ordinance and the total area at its outer edge was from two to three miles distant from the city limits prior to the adoption of the ordinance. Petitioners say that the submerged lands are not "adjacent" because the words "additional territory lying adjacent to such city" as used in Art. 1175-2 connote only that territory that bears a reasonable relation to the lands already occupied by the City and refers to such lands that would be of some use to and suitable for the needs and requirements of the annexing city and have some features in common therewith. Under the authorities cited above we hold that the usual meaning of the word "adjacent" must be applied to the words of the statute and that the Legislature used the term in the sense of being "contiguous" and "in the neighborhood of or in the vicinity of," without reference to the character of the land or the use to which it is put.

We held in *City of Wichita Falls* v. *Bowen*, 143 Tex. 45, 182 S.W. 2d 695, that although Sheppard Field, a U. S. military base, was under the exclusive jurisdiction and control of the federal government, this fact constituted no legal objection to its annexation within the city limits and overruled the contention that it was not adjacent in the sense used in Art. 1175-2.

In support of their contention petitioners cite us to *State ex rel Childs* v. *Village of Minnetonka*, 57 Minn. 526, 59 N.W. 972 (p. 6). In that case the Court had under consideration a statute providing for the incorporation of villages. The statute read: "Any district; sections or parts of sections which has been platted into lots and blocks, also the land adjacent thereto * * * said territory containing a resident population of not less than 175, may become incorporated as a village." The territory sought to be incorporated as a village contained nearly 35 square miles. In this

area there were some 17 or more tracts which had been platted but were separated by farm and uncultivated lands. The Court points out that the evidence did not indicate with any certainty which of the numerous plats was to be the nucleus of the proposed village. The Court said that the term "lands adjacent thereto" meant those lands that had such close proximity as to be suburban in character and to have some unity of interest with the proposed village, but that the statute did not contemplate that remote territory having no natural connection and no adaptability to village purposes should be included. We do not regard this interpretation of the Minnesota statute for incorporation of villages as to have any bearing upon the problem before us.

The case of *Hauge* v. *City of Des Moines*, 197 Iowa 907, 196 N.W. 68, deals with a district created by the City for the purpose of extending and improving a certain street. The Court merely held that the plaintiff was entitled to be heard on the issue as to whether or not her lot was adjacent to the improvements. The property was not being annexed or taxed by the City for general purposes. Thus the holding is not in point.

Lastly petitioners assert that a home rule city is without authority of law or power to annex state owned submerged bodies of land along the Gulf Coast such as we are dealing with here.

While no Texas appellate court has expressly passed upon this question so far as has been called to our attention, there are Acts of the Legislature indicating most strongly the contrary of petitioners' position in this respect.

In *City of Oak Cliff* v. *State ex rel Gill*, 97 Tex. 383, 79 S.W. 1, it is shown that the Legislature by special enactment extended the boundaries of the City of Dallas so as to include a segment of the Trinity river, the underlying

bed of which belonged to the State of Texas as much so as the submerged lands along the Gulf Coast. Also, the following articles of our statutes, namely, 1178a, 1179, and 1180a would rather clearly indicate that it was not contrary to the legislative will nor forbidden that parts of navigable streams and submerged lands, inland or coastal, be included within the boundaries of home rule cities. Our attention is called to Special Laws, 28th Legislature, ch. 37, enacted in 1903, that, in providing the City of Galveston with a charter, defines the city limits so as to include parts of Galveston Bay and other waters. If the Legislature has that power then the power has been delegated to home rule cities.

Petitioners rely on *Mahood et al* v. *State ex rel Davis*, 101 Fla. 1254, 133 So. 90. In that case a small village or hamlet, known as Miami Shores, was located west of Biscayne Bay. A majority of its electors, some 38 in number, proceeded to organize a municipal corporation in certain statutory provisions and attempted to include within its corporate limits territory lying east of Biscayne Bay. The Court held that there was no statutory authority permitting the creation of a municipal corporation to embrace territory not a part of the village or hamlet and the citizens were limited to forming a municipal government having jurisdiction over the village. We do not regard this case as authority for the contention that a Texas Home Rule City cannot annex submerged land belonging to the State of Texas, nor for the proposition that the submerged lands in our case are not "adjacent territory."

Petitioners argue that if these lands are annexed the leasehold interest of the petitioners as well as any future leases that may be granted by the State will be taxed on an ad valorem basis. They say that inasmuch as rentals and bonuses accrue to the State for the benefit of the State

school funds, taxation by the City will necessarily reduce the amount bid for these leases and thus affect adversely and diminish the revenue derived by the State from this source. While admittedly this result might obtain to some degree, we think the prospect is not sufficient to set aside this ordinance. If this consequence is thought to be evil the Legislature may deny to any municipality the right to extend its boundary lines over onto submerged lands belonging to the State of Texas and thus put another limitation upon the City's powers of expansion.

The apprehension, such as that voiced in the dissent to the decision in the Sulphur Springs case, that a city may thus extend its boundaries indefinitely is not warranted. As to whether or not a proposed annexation includes territory that is not adjacent becomes a law question and the courts will determine whether or not it lies "in the neighborhood of" or "in the vicinity of" and contiguous to the annexing city. We hold as a matter of law that the territory here sought to be annexed by the ordinance in question is *adjacent* territory and the ordinance must be held validly within the legislative powers of the City Commission.

The judgments of the trial court and the Court of Civil Appeals are affirmed.

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FRANK P. CULVER, JR.
Associate Justice

Opinion delivered:

May 22, 1957

DISSENTING OPINION

From the standpoint of the political theorist plausible arguments may undoubtedly be marshalled to support the proposition that the internal governmental organization of a state or commonwealth is purely a political matter and that one unjustly treated by reason thereof should address his appeal to the legislative rather than to the judicial branch of government. However, as I understand the decision of the Supreme Court of the United States in *Myles Salt Co.* v. *Board of Commissioners*, 239 U.S. 478, 36 S. Ct. 204, 60 L. Ed. 393, it is a flat holding to the contrary of the proposition stated. When confronted with the provisions of the Fourteenth Amendment to the Constitution of the United States, the distinction between a Louisiana drainage district and a Texas city escapes me. Neither drainage districts, cities nor other forms of state internal organization are mentioned in the amendment, which simply provides that no state shall "deprive any person of life, liberty or property, without due process of law." This wording applies to action by the state itself or by any and all of the political subdivisions thereof, no matter how broad or limited their governmental powers may be. The Myles Salt Company case holds that the inculsion of certain lands within the boundaries of a political subdivision of a state may constitute a deprivation of property without due process of law.

Under this holding municipal annexation proceedings which by Texas law necessarily operate to subject property to taxation cannot be removed beyond the scope of the Fourteenth Amendment by classifying them as being political in character. The distinction between the drainage district on one hand and the city on the other is not found in the substantial nature of such organizations — both are govern-

mental and political —, but rather in the scope of benefits conferred by the respective organizations and their relationship to the public at large. The deprivation of property by the simpler district having for its purpose the one function of draining lands may be much clearer than a somewhat similar but vastly more complicated situation involving a city which is a highly complex organization performing multitudinous governmental and proprietary functions. While the mere taxing of land which cannot be drained makes obvious the fact that one man's property is being "taken" for the benefit of another, the exercise of jurisdiction by a city over a given territory may present a problem difficult of solution because of the necessary consideration of municipal needs and the various detriments and benefits, direct and indirect, usually attendant upon including lands within the boundaries of a city. This circumstance, however, relates to the question of whether there has been a deprivation of property and constitutes no basis for saying that the simple organization is controlled by the Fourteenth Amendment while the complex orzanization is essentially political and hence beyond the reach of the judicial power.

In my opinion the Court of Civil Appeals correctly held that the due process clause of the general constitution has application to the annexation of additional territory by a city. The opinion of that court also suggests the controlling factors which determine the validity of an annexing ordinance. Benefits or lack thereof accruing to the owner of property sought to be annexed cannot be made the sole test of the validity. Property is held subject to the general good, and if essential to municipal needs, a city's action in assuming authority or jurisdiction over such property cannot be gainsaid, although no direct benefit accrues to the owner of the property. When, however, property that will

receive no benefits from the municipality, either immediate or reasonably prospective, which is wholly unrelated to the city's present or reasonably prospective economic or municipal needs is subjected to the jurisdiction of a city and its taxing powers by means of an annexation ordinance, then such action must be considered as unreasonable and arbitrary and hence invalid as constituting an unwarranted deprivation of property within the meaning of the Fourteenth Amendment to the federal Constitution.

The Court of Civil Appeals seemingly regarded the allegations of the petitioner's pleadings as being insufficient to contradict the presumption of constitutionality which attends legislative actions. In so doing, I think the court clearly erred. While the ultimate question of the constitutionality of the ordinance may be one of law, this does not preclude a consideration of facts. When in the nature of things, knowledge of a particular economic, local geographic, or other special situation is desired and cannot be supplied by judicial notice or common knowledge, it is essential that evidence be received. This principle was recognized by the Court of Civil Appeals when it said that:

> "• • • a claim of deprivation of property without due process is to be determined always as a matter of law, never as a question of fact, although such determination may involve the finding of facts. We quote the text of 82 C. J. S., Statutes, §79, p. 134, 'Whether a seeming act of a legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury, even though a determination of the question may involve a finding of fact.'"

The majority opinion sufficiently summarizes the allegations of the petition for the present purpose. Briefly, the territory sought to be annexed embraces some 2,000 acres of land owned by the State of Texas which underlies the

waters of the sea. It is alleged that such territory is unsuited for human habitation, that it has no need for urban services, that it is wholly unsuited to any legitimate municipal need, either immediate or prospective, and was annexed for the sole purpose of taxing petitioners' mineral estates underlying the water of the bays. Petitioners complain that while the Court of Civil Appeals recognizes the right of judicial review, it nevertheless effectively deprives them of such right by substituting a set of hypothetical facts in lieu of those alleged by the petitioners. In my opinion there is merit in this complaint. We are dealing with a local situation beyond the ken of common knowledge. To my mind, considering the total lack of evidence, it is mere surmise to speculate upon the possible municipal need the 2,000 submerged acres would fulfill. If we may mentally envision ports, docks, parks for fishing and boating, turning basins and the like, in order to justify the present attempted annexation, could not a similar technique be employed to authorize municipal annexation of a drilling platform, three leagues seaward from the Texas shore line? Speculations outside the field of common knowledge constitute poor guides for the definition of property rights, and this case calls for the same species of factual information that was deemed pertinent in *Borden Farm Products* v. *Baldwin*, 293 U.S. 194, ... S. Ct., ..., 79 L. Ed. 281, wherein the 1933 New York Milk Control Law was attacked as being violative of the Fourteenth Amendment. In the case mentioned the Supreme Court of the United States, in an opinion by Chief Justice Hughes, reversed a decree of the District Court and remanded the cause for a hearing upon the facts. In the opinion it was said that:

> "In view of the peculiar nature and effect of this provision [of the Milk Control Act], and of the novel and important constitutional question that it presents, we

think that the complaint should not have been dismissed for insufficiency upon its face and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court, unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provision should be sustained as resting upon a rational basis consistent with constitutional right."

In speaking of the nature of the presumption relating to the validity of legislative action, Chief Justice Hughes said:

"Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. (Citing authorities.) It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

It is perhaps worthy of note that Justices Stone and Cardozo concurred in the result with a memorandum, which inter alia contained the following:

"We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

The answer to the question of the validity of the annexation ordinance may be more justly and accurately given after the hearing of evidence. If there be a substantial constitutional question involved it cannot be resolved upon the basis of common knowledge or judicial notice alone, nor by resort to presumptions of doubtful application. It follows then that the petitioners are entitled to be heard upon the facts. In such a hearing and only then can it be satisfactorily determined if the annexation ordinance is arbitrary and void. I would reverse the judgments of the courts below and remand the cause for development of the facts. I accordingly respectfully dissent from the order of affirmance.

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JAMES R. NORVELL
Associate Justice

Associate Justices Griffin, Smith and Walker join in this dissent.

Opinion delivered: May 22, 1957

IN THE

Court of Civil Appeals

FOR THE FIRST SUPREME JUDICIAL DISTRICT
GALVESTON, TEXAS

No. 12,974

THE STATE OF TEXAS EX REL, PAN AMERICAN PRODUCTION COMPANY, ET AL.,

Appellants,

v.

CITY OF TEXAS CITY, TEXAS, ET AL.,

Appellees.

APPEALED FROM DISTRICT COURT OF GALVESTON COUNTY

This is a proceeding in the nature of quo warranto brought by the State of Texas against the City of Texas City and its governing body on relation of Pan American Production Company, Sun Oil Company, Freeport Sulphur Company, John W. Mecom, and Radford Byerly, Trustee of the Mecom Trust. The purpose of the suit was to test the validity of an annexation ordinance insofar as the ordinance purports to include within the city boundaries, as extended thereby, navigable submerged lands of the State of Texas and certain mineral leasehold interests of relators herein. All of the disputed territory lies within the shorelines of Moses Lake and Dollar Bay in Galveston County.

These waters together constitute a single arm or extension of Galveston Bay.

Judgment below went against the State and relators, and they appeal.

Since, in our opinion, the State and relators neither allege nor can allege facts entitling them to the relief they ask, we forego a discussion of the detail of the trial below, and treat the appeal as if the trial court had rendered judgment on the face of the pleadings without allowing the plaintiff and relators right of amendment.

A summary of the facts and contentions shown by the trial petition as clarified and altered by certain stipulated facts follows:

The City of Texas City is a home-rule city. On the 12th of November, 1954, its governing body finally enacted an ordinance extending the boundaries of the City to include a large amount of additional territory in the northerly vicinity of the City's prior existing limits. Included within the area described in the annexing ordinance are the disputed areas of Moses Lake and Dollar Bay, in parts of which relators hold leasehold estates consisting of oil, gas and minerals conveyed to them by the State of Texas. Unless restrained the defendants will place the property of relators on the tax rolls of the City of Texas City and will tax said property for municipal purposes.

Relators hold title directly from the State to the oil, gas and other minerals in two certain tracts of land numbered respectively 356 and 357. The leasehold estate in Tract No. 356 covers 726 acres and has at all times been owned exclusively by Pan American Production Company. The leasehold estate in Tract No. 357 originally leased by the State to Sun Oil Company consists of 617 acres in Dollar Bay. 80 acres of minerals in said tract are owned jointly by Sun Oil Company, Freeport Sulphur Company, John W.

Mecom, and the Mecom Trust. The remainder of the leasehold estate in this tract is wholly owned by Sun Oil Company.

Each and all of relators' leasehold estates include the usual and ordinary appurtenant surface rights reasonably necessary or desirable to conduct exploration and production operations.

At all material times oil and gas in paying quantities have been produced from each of said leases and each of said leases remains valid and subsisting.

Pan American Production Company is presently producing oil from points in strata underlying the area of its lease through eighteen producing wells, all directionally drilled from surface locations on dry land outside the boundaries of the shorelines of Moses Lake, except seven which were drilled from surface locations on the south shore of Moses Lake. The surface locations from which said seven wells were drilled lie inside the boundaries described in the annexing ordinance under review. The well heads of all other wells of Pan American Production Company lie outside of the boundaries of Texas City, however determined. All of Pan American Production Company's producing wells are producing from points in sands located within the area described in the annexing ordinance. Each of Pan American Production Company's producing points is located far out in Moses Lake and is under submerged territory.

The mineral estate jointly owned by Sun Oil Company, Freeport Sulphur Company, John W. Mecom, and the Mecom Trust is producing from two wells directionally drilled from shore locations on the south shore of Dollar Bay. These wells are drilled to, completed at, and are producing from, sands at points well within the area of the Bay. The leasehold estate wholly owned by Sun Oil Com-

pany is presently producing from only one well. Such well and another abandoned well originally productive of oil and gas in paying quantities were drilled as straight bore holes from barges out in the Bay. The completion and production equipment necessary to produce said wells includes a well head platform and the usual Christmas tree and fittings.

Except for relators' leasehold estates, all property interests within the shorelines of Moses Lake and Dollar Bay are owned by the State of Texas.

While appellants allege nothing in derogation of relators' surface rights in the area of Moses Lake and Dollar Bay, they do allege that with the sole exception of the platform and Christmas Tree connections on one presently producing Sun Oil Company well they have not in fact installed, and do not maintain, any physical surface production properties of any nature whatsoever within the shoreline boundaries of Moses Lake and Dollar Bay, such as platforms, pilings, derricks, tanks, pipelines, or other surface equipment. If no pipeline has ever been maintained from the straight bore holes of Sun Oil Company, it is a fair inference from the petition that the production from such well is transported to dry land either over or through the waters submerging the area of the leasehold estate by equipment capable of negotiating the trip.

It is alleged that relators' present directional methods of operation, both in drilling and producing their leases from dry land locations, are practicable and that none of relators has any present intention of ever installing "any other physical properties of the nature hereinabove referred to [surface equipment] upon the bed of said lake and/or bay or the surface waters thereof in the enjoyment of said leasehold estates." However, the right of relators to do so is not negatived.

The area described in the annexing ordinance includes 5539 acres, of which 3528 acres is dry land, the remaining 2011 acres being submerged lands underlying Moses Lake and Dollar Bay. The submerged area is bounded on the west and east by dry land and on the south by the existing dry land northerly boundary of Texas City. The submerged opening where Moses Lake and Dollar Bay join Galveston Bay is approximately 2500 feet wide. The waters in Moses Lake and Dollar Bay are navigable and are subject to tidal effects. This territory is a part of the sovereign jurisdiction of Texas and of the United States. Presently the State is exercising its regulatory jurisdiction of the area to the extent thought necessary through the Railroad Commission of Texas and the Game, Fish and Oyster Commission. Likewise the United States presently exercises its jurisdiction over navigation and navigable waters in the area through the Corps of Engineers of the United States Army. Though not alleged, we must presume the State is also exercising its taxing jurisdiction over relators' private property interests through its properly constituted executive authority, in compliance with constitutional mandates.

No humans inhabit the submerged areas covered by Moses Lake and Dollar Bay, and no structures designed for human habitation exist therein. The petition alleges that the submerged areas in controversy are not fit for human habitation or subject to being made so in the foreseeable future, and contends from this that there is neither present nor prospective need in the submerged area for police and fire fighting protection ordinarily furnished by municipal corporations to their inhabitants for the preservation of life, limb and property. It is alleged that there is no substantial traffic within the submerged area and that there is no reasonable need for municipal regulation of that which exists.

In connection with these allegations it is alleged that the defendant City has no good faith intention of using any of the submerged area in controversy for municipal purposes nor of furnishing said area with any municipal facility or service, and that the City has "purported to annex" the area in controversy solely for the purpose of taxing same and deriving additional revenue therefrom without any compensating factor to relators.

It is alleged that the charter of Texas City permits the governing body, on its own motion, to de-annex uninhabited territory "not suitable or necessary for city purposes", but that relators' prior diligent efforts at relief under such charter provision have proved fruitless, despite the fact that the disputed submerged area is not suitable and necessary for city purposes.

It is claimed under the facts alleged that the portion of Moses Lake and Dollar Bay included within the description of the territory covered by the annexing ordinance is not "territory" or "additional territory" or "adjacent territory" within the meaning of the Enabling Act, Article 1175, Sec. 2, V.A.T.S., the language of which embraces every express limitation on the right of home-rule cities to annex territory.

It is alleged that all of Moses Lake and Dollar Bay, described in the annexing ordinance, is a water area and submerged land, and property owned exclusively, except for relators' leasehold interests, by the State of Texas. On such allegations it is claimed that no part of Moses Lake or Dollar Bay may be validly annexed by a Texas municipal corporation.

Because of the foregoing facts, it is claimed that "Relators' property in and under Moses Lake and Dollar Bay", being unsuitable for human habitation, is not susceptible of being adapted to city purpose or use, and that "Relators'

said leasehold properties", if permitted to be annexed by defendant, City of Texas City, would not be used for municipal purposes, and that the City has no intention of using said property for such purposes.

There are further allegations claiming that "Relators' leasehold estates and their purported inclusion within the extension of the limits of the City of Texas City bear no reasonable relation to the present needs of the City or its future growth" and that said properties and their purported annexation are wholly unrelated to the economic and municipal needs of the City of Texas City. Other allegations establish substantial expenditures by relators stemming from the directional drilling of their properties, and it is additionally alleged that the defendant City is not in position to furnish any facilities which relators may require or even use, or "to furnish any benefits or services to relators in any manner whatsoever." It is also claimed that the inclusion of Relators' said leasehold estates" within the limits of the defendant City would subject same to ad valorem and other taxes to be levied by the defendant City, without any possibility of said properties receiving any return by way of municipal improvements, service or protection. It is alleged alternatively to the allegations that the defendant City is without color of authority to include the submerged areas in dispute within the area described in the ordinance of annexation, that under the pleaded facts the adopted ordinance, as to relators and their leasehold estates, constitutes a plain abuse of power and an arbitrary attempt to exercise the power of annexation which, unless restrained, will, insofar as said ordinance annexes relators' leasehold estates, have the effect of taking relators' property for public use without adequate compensation being first made.

There is a further claim that unless the City be restrained from proceeding under said ordinance, the levy and collection of taxes from relators will result in relators being deprived of their property without due process of law. Sections 17 and 19 of Article I of the Constitution of Texas, as well as the Fourteenth Amendment to the Constitution of the United States, are specially pleaded and relied on.

It is also claimed that the annexation ordinance contravenes Section 5 of Article XI of the Constitution of Texas, which prohibits home-rule cities from adopting any ordinance containing provisions inconsistent with the State Constitution or its general laws enacted by the legislature. It is alternatively alleged that if the ordinance be not void, it is at least voidable as an arbitrary and unjust exercise, that is to say, a plain abuse of power, at least as to the property of relators.

In their brief appellants bring forward four formal points or error; however, reduced to their essentials, these points embrace but two grounds of error upon which appellants rely for reversal. These grounds may be stated as follows: (a) Under the Constitution and laws of the State, home-rule cities have no power to annex submerged navigable State owned land; (b) The ordinance in practical operation by reason of the levy of municipal taxes upon relators' properties will deprive relators of their property without due process of law, since, as a matter of law, the ordinance is wholly unrelated to any economic or municipal need of the City of Texas City, and under the facts alleged is incapable of producing any benefit however slight to relators or their property. On these claims, which the appellants say the facts alleged establish as a matter of law, appellants contend the legislation is a plain and palpable abuse of power, a legal fraud, violative of the due process clauses of the State and Federal Constitutions, each and both.

The Power of Home-Rule Cities to Annex Submerged Navigable State Owned Lands

It is now thoroughly settled Texas law that home-rule cities, absent a palpable abuse of power, may annex any territory within the State provided only that it lie adjacent to the municipality. Vernon's Annotated St. Const., Art. 11, Sec. 5; Vernon's Annotated Texas Statutes, Art. 1175, Sec. 2; *City of Houston et al* v. *State ex rel City of West University Place et al,* 142 Tex. 190, 176 S.W. 2d 928; *State of Texas ex rel Walker* v. *City of Gladewater,* 157 S.W. 2d 641. If, then, the submerged and navigable area of Moses Lake and Dollar Bay under consideration may be said to be territory adjacent to Texas City, there can be no doubt of the right of the City of Texas City to annex any of such area unless, because beyond the plain legislative intent, we are able to read into Section 2 of Article 1175, V.A.T.S., an implied exception of State owned navigable submerged areas.

The case of *City of Wichita Falls* v. *Bowen,* 143 Tex. 45, 182 S.W. 2d 695, is authoritative on the proposition that a remote area owned by the United States government and used by it as a military reservation, and temporarily under its exclusive jurisdiction, and connected to the City of Wichita Falls only by a narrow stem some ten miles in length, constitutes territory lying adjacent to the City of Wichita Falls. It is inescapable from this decision, we feel, that any government-owned territory — state or federal — is within the meaning of the statutory phrase "additional territory lying adjacent" to cities. This being so, we fail to see how the fact of State ownership of an area can logically be urged as an element to be considered in determining whether a particular area is either territory or adjacent.

Nor do we consider the fact that the territory here involved is submerged and navigable material to these ques-

tions. We are referred to Senate Bill No. 298, Acts of 1913, page 47, Ch. 25, for "a clear legislative pronouncement" that absent express statutory authority, Texas cities are wanting in power to annex *navigable territory*. This proposition is independently presented, and is not said to be dependent upon the fact of *State ownership*. Senate Bill No. 298 was enacted into law some days prior to the enactment of the Home-Rule Enabling Act. However, had both pieces of legislation passed into law simultaneously we would still be unable to accept the claim made for Senate Bill No. 298, for we see in it not an extension of authority to cities to annex navigable streams, but rather an extension of authority to annex *remote territory up to twenty miles from the ordinary boundaries of cities*, a power which plainly, but for the legislation, the designated cities would not have had. A later statute enacted in 1933, Article 1187a, impresses us as legislative recognition of a prior existing right in home-rule cities to annex navigable submerged territory. From the language of that statute we are convinced that the phrase "additional territory lying adjacent" in Article 1175, Sec. 2, does not carry an implied exception of navigable submerged territory, because Sec. 1 of Article 1187a presupposes that home-rule cities may have deep water ports "located within the limits of said" cities.

Appellants cite cases holding that the word "adjacent" is of elastic meaning, to be determined by the context in which used, surrounding facts and circumstances, and the subject matter which it qualifies. Typical of these is *State ex rel Childs* v. *Village of Minnetonka*, 57 Minn. 526, 59 N.W. 972, holding that the phrase "lands adjacent" was not designed to cover "*remote* territory, having no natural connection with the Village and no adaptability to Village purposes • • •." We find nothing in these cases contrary to our conclusion that submerged navigable State owned

territory reasonably near to the boundaries of home-rule Texas cities is "additional territory lying adjacent" to such cities, as that phrase is used in Sec. 2 of the Enabling Act, Art. 1175, V.A.T.S. We hold that under our presently existing Constitution and State laws, home-rule cities have plenary power to annex State owned navigable submerged territory lying adjacent to their existing boundaries, subject only to constitutional inhibitions against palpably arbitrary abuse of the power.

The Contention that the Annexation Ordinance under Review Deprives Relators of Their Property Without Due Process of Law

We entertain no doubt that the due process clauses of the State and Federal constitutions constitute an effective restraint upon all powers of State government, whether legislative, executive or judicial. This is clearly true of Art. 1, Section 19 of the State Constitution, which is one of twenty-nine sections designated as a Bill of Rights, consisting of *"express limitations of power." Travelers Insurance Company* v. *Marshall,* 76 S.W. 2d 1007. The legislative power is no exception. 9 Tex. Jur., page 449, Constitutional Law, Sec. 35; *H. & T. C. Ry. Co.* v. *Dallas,* 98 Tex. 396, 84 S.W. 648. See also the interpretive commentary under Art. I, Sec 19, Vernon's Texas Constitution.

The right of property is a fundamental, natural, inherent, and inalienable right, not of grace from the Legislature, but "ex debito from the Constitution," 11 Amer. Jur., page 1145, Constitutional Law, Section 335. This right of property, which embraces all the incidents of property, is a sacred and fundamental one. *Spann* v. *Dallas,* 111 Tex. 350, 235 S.W. 513. Its denial has no place in a government of free men; however, like any other right held in a free society, the right of property is subject to the reasonable

exercise of the police and taxing power of the State. So, it can no longer be claimed that the reasonable exercise by the State of its proper power to enact taxing laws or police regulations constitutes deprivation of property without due process of law. It is true also that short of palpable abuse, concerning which *the minds of reasonable men could not differ,* the right to determine upon the wisdom and reasonableness of legislation lies exclusively in the legislative department — not subject to review by the judicial department on any considerations of wisdom or policy — but only for plain palpable, arbitrary injustice irreconcilable with the natural and inalienable rights of citizens. This is but another way of saying that a claim of deprivation of property without due process is to be determined always as a matter of law, never as a question of fact, although such determination may involve the finding of facts. We quote the text of 82 Corpus Jur. Sec., page 134, Sec. 79, Statutes, "Whether a seeming act of a legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury, even though a determination of the question may involve a finding of fact." The principle has been recognized in Texas. See *Hurt* v. *Cooper,* 113 S.W. 2d 929, 942.

The party claiming legislation to be invalid as constituting a deprivation of property without due process carries a heavy burden. He must establish such invalidity "clearly or beyond a reasonable doubt, and must overcome, by facts judicially known or proved, not only *the evidence sustaining constitutionality,* but *any state of facts which can be reasonably conceived to sustain it.*" (Emphasis added.) 16 Corpus Jur. Sec., page 407, Constitutional Law, Sec. 99. Differently stated, the rule appears to be that constitutional invalidity must appear conclusively, plainly

or palpably, and beyond any and all reasonable doubt. There is always a presumption of constitutional validity and it is especially strong in respect to statutes relating to taxation. Nor may that presumption be rebutted on *mere general conclusions* of fact or of law alleged in a petition. See *LeClair* v. *Swift,* D.C. Wisconsin, 76 Fed. Supp., 729. Courts are not free to declare a statute unconstitutional where there is room for a fair difference of opinion, but only for clear and compelling reasons. However, we are not to be understood, from the foregoing, as recognizing that the Supreme Court case of *City of Gladewater* v. *State of Texas ex rel Walker,* 138 Tex. 173, 157 S.W. 2d 641, holds that courts have no power to review legislation even when attacked on constitutional grounds. This seems to be the construction put upon that case by defendant, City of Texas City. In our view, the *Gladewater* case must be read and construed in the light of the contentions there made. The real basis of appellant's contention in the *Gladewater* case, we infer, was that the court was bound by the jury's verdict establishing the unreasonableness of an ordinance, since there was complaint that the judgment of the trial court was rendered *non obstante veredicto.* If, as we understand it, questions of due process are always to be decided, not as a fact question, but as a matter of law; then it is plain that juries should not be permitted to review the reasonableness or wisdom of legislation, directly or indirectly. In fact, no issue should ever be submitted to a jury unless the minds of reasonable men could differ thereon. Granted that premise, the questions upon which the jury passed in the *Gladewater* case were purely political in character, plainly issues of fact and not of law, and should never have been submitted to the jury. As we read the *Gladewater* case, the Supreme Court merely went along with the trial court's holding, that the plaintiffs had failed to negative every reasonably conceivable ground upon

which the annexation ordinance there involved could be sustained. This interpretation is buttressed, we think, by the opinion of the same Court in the *West University Place* case, *supra,* two years later, where it is plainly held that courts do have power to review annexation ordinances when it appears from facts judicially known to the court or otherwise established that such ordinances are wholly unrelated to the municipal and ecomonic needs of the city. In the latter case the Court actually reviewed the annexing ordinance for constitutionality but found itself unable to say in the light of the record in that particular case that the territory there involved "was so unrelated to petitioners' economic and municipal needs as to be wholly unreasonable and arbitrary, and for that reason, subject to judicial review."

Here the territory sought to be annexed is not remote from the prior existing boundaries of Texas City. In fact, it is contiguous to them, and it is clear to us, not necessarily that there are, but that there may be reasonable bases for the annexation of the territory by Texas City. It could very well be needed, or at lease thought desirable for port facilities, docks, piers, a ship channel, and, perhaps a turning basin. It might be desirable for use as a public park for fishing, boating, etc. We are not concerned, nor permitted to concern ourselves, with the actual motivation of the defendant city, but only with whether there might have been, or might be, reasonably conceivable grounds to justify the annexation of the terriory as having some desirable relation to the City's economic and municipal needs, governmental or proprietary. In determining the desirability of the annexation, the City of Texas City is entitled to take into consideration not only relators' present activities, but its past activities and what they may decide to do in the future, and, as well, what other State lessees may conclude to do. It could very well come to pass that permissible exploration and producing activities of relators

and other lessees would give rise to reasonable need for police and fire protection. Such regulations may very well be in relators' own interest and in the interest of other potential lessees. There is no constitutional requirement that ad valorem taxes which may be levied by the City of Texas City on relators' property be used to produce benefits to relators exactly equal in monetary value to the amount of taxes. It is only necessary that it be conceivably reasonable that some such benefits may result. Our ruling is thought to be well within the spirit of *Myles Salt Company* v. *Iberia Drainage District*, decided by the Supreme Court in 1916, 239 U.S. 478. That case involved a drainage district — a form of municipal corporation — organized for "the special purpose of the improvement of particular property". The facts in that case established that the inclusion of relators' property in the drainage district could be of no possible benefit to either relators or to other property in the district. There the court actually considered and rejected the possibility that relators' elevated property might be used as a receptacle for stagnant water which would otherwise be a menace to health if not included within the district. The Court said: "But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be indirect such as might accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks Island could be a receptacle for stagnant water or would be otherwise a menace to health if not included within the district or would defeat the purpose of the law, which seems to have been the ground of decision in *George* v. *Sheriff*, 45 La. An. 1232."

It is significant, we think, that the federal Supreme Court has passed on no case since 1916 complaining on constitu-

tional grounds of the annexation by an ordinary city of additional territory. To our minds it is also significant that we are cited to no case by our State Supreme Court where the annexation of additional territory by an ordinary municipal corporation has been declared void on the basis of the plain palpable abuse of power contrary to the due course of the law of the land provisions of the State Constitution, though the right and duty of courts to review the legislation when attacked on such grounds is clearly implied from very early Texas decisions. See *Ewing et al* v. *State of Texas ex rel Pollard et al*, 16 S.W. 872 (1891), where the court said: "So, also, if the legislature had provided that the cities proposing to incorporate under the general laws should be empowered to embrace territory lying beyond their actual limits, it may be that, *in the absence of a clear abuse of power*, it would be the duty of the courts to respect the legislative will, and to hold an incorporation including such additional territory valid." (Emphasis added.) See also *State* v. *City of Waxahachie*, 81 Tex. 626, 17 S.W. 348, where, in construing the statute there under review, the court held the right to annex certain excess territory to come fairly within the spirit of the statute because the territory might be said to be "in some respects useful and material."

Since, in our opinion, neither the facts alleged nor any which could be alleged may negative the reasonable possibility that the area involved in the attack on the annexation ordinance may be "useful and material" or, in some aspect, related to conceivable economic and municipal needs of the City of Texas City, we feel that relators' claim of unconstitutionality based on the due process clauses must be overruled.

Affirmed, Associate Justice Cody not sitting.

/s/ GAIUS G. GANNON
Associate Justice.

Judgment rendered and opinion filed November 1, 1956.

No. 84,926

THE STATE OF TEXAS, EX REL,
PAN AMERICAN PRODUCTION COMPANY, ET AL,

v.

CITY OF TEXAS CITY, ET AL

IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS,
10TH JUDICIAL DISTRICT

JUDGMENT

Be it remembered that on the 22nd day of July, 1955, at a regular term of this court and after considering the pleadings and argument of counsel, the court duly entered its order overruling defendant's special exception No. 1 and sustaining defendant's special exceptions Nos. 2, 3, 4, 5 and 6 to plaintiff and relator's original petition herein, to which order of the court plaintiff and relators duly excepted, and declined to amend their said petition, and

Be it further remembered that on the 29th day of November, 1955, at a regular term of this court, came on to be heard the above styled and numbered cause, and thereupon came plaintiff, the State of Texas, and relators Pan American Production, Sun Oil Company, Freeport Sulphur Company, John W. Mecom and Radford Byerly, Trustee of the Mecom Trust, by and through their attorneys of record,

and came defendants, the City of Texas City, Texas, L. A. Robinson, Charles L. Vance, W. P. Tarpey, Jr., A. Foster Jones and A. P. Waggoner, by and through their attorneys of record, and all parties announced ready for trial. No jury having been requested, the parties proceeded to read their pleadings and to adduce their evidence before the court until all parties announced that they had rested.

Thereafter, the court heard argument of counsel and the court being of the opinion that, under the pleadings and the evidence, judgment should be rendered herein in favor of defendants, accordingly, it is therefore

ORDERED, ADJUDGED AND DECREED that the relief by way of injunction requested by plaintiff and relators be, and it is hereby, denied and that plaintiff, the State of Texas, and relators, Pan American Production Company, Sun Oil Company, Freeport Sulphur Company, John W. Mecom and Radford Byerly, Trustee of the Mecom Trust, take nothing by their suit against defendants City of Texas City, L. A. Robinson, Charles L. Vance, W. P. Tarpey, Jr., A. Foster Jones and A. P. Waggoner, but that judgment be and it is hereby rendered for said defendants.

All costs of court are taxed against relators, for which let execution issue.

To which judgment of the court, plaintiff and relators duly objected and excepted and gave notice of appeal to the Court of Civil Appeals at Galveston, Texas.

EXECUTED this 6th day of December, 1955.

/s/ DONALD M. MARKLE
Judge

APPENDIX B

Fourteenth Amendment to the Constitution of the United States

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article XI, Section 5 of the Constitution of Texas

"Cities having more than five thousands (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years."

Article 1175, Section 2 of Vernon's Texas Revised Civil Statutes

"Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * * *

"2. The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter."

Article I, Section 4, Subsections C and E of the City Charter of the City of Texas City, Texas, adopted February 16, 1946

"C. In addition to the methods of extension of boundaries previously set forth in this Charter and as an alternative thereto the city commission shall have the power by ordinance to fix the boundary limits of said City of Texas City and to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city with or without the consent of the inhabitants of the territory annexed. Upon the introduction of such an ordinance in the commission it shall be published in some newspaper in the City of Texas City one time, and shall not thereafter be finally passed until at least thirty (30) days have elapsed after said publication, and when said ordinance is finally passed the said territory so annexed shall [illegible] a part of the City of Texas City, and the inhabitants thereof shall be entitled to all the rights and privilages of other citizens, and shall be bound by the acts, ordinances, resolutions, and other regulations of said city."

"E. Whenever there exists within the corporate limits of the City of Texas City any territory not suitable or necessary for city purposes, the commissioners may, upon a petition signed by a majority of the qualified voters residing in such territory, if the same be inhabited, or without any such petition if the same be uninhabited, by ordinance duly passed by a majority vote of all the commissioners, discontinue said territory as a part of said city; said petition and ordinance shall specify accurately the metes and bounds of the territory sought to be eliminated from the city and shall contain a plat designating such territory so that the same can be definitely ascertained; and when said ordinance has been duly passed, the same shall be entered upon the minutes and records of said city, and from and after the entry of such ordinance, said territory shall cease to be a part of said city, but said territory shall still be liable for its pro rata share of any debts incurred while said area was a part of said city.

"The city shall continue to levy, assess and collect taxes on the property within said territory to pay the indebtedness incurred while said area was a part of the city, as though the same had not been excluded from the boundaries of the city."

Ordinance of the City of Texas City, Texas, adopted November 12, 1954, and recorded in Ordinance Book V, at Page 70, et seq., Ordinances of the City of Texas City, Texas

"BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF TEXAS CITY, TEXAS:

"Section 1. That the following described land and territory lying adjacent to the City of Texas City, Galveston County, Texas, be and the same is hereby added and annexed to the City of Texas City and that

said territory and land hereinafter described shall hereafter be included within the boundary limits of the City of Texas City, and that the present boundary limits of the City of Texas City, at the various points bordering the area hereinafter described are altered and amended so as to include said area within the corporate limits of the City of Texas City, as follows:

"BEGINNING at a point in Galveston Bay where the North Right of Way line of State Highway No. 146, extended East intersects with the United States Harbor Line extended N. 8° 56' 23" West from Point "G" of said Harbor Line; said Beginning point being also the most Northerly Northeast corner of the City limits of Texas City, Galveston County, Texas, heretofore established: Thence N. 8° 56' 23" W. continuing with the extension of the United States Harbor Line to a point where said extension intersects with the West Shore Line of Galveston Bay; Thence continuing in a Northerly and Northwesterly direction along the West Shore Line of Galveston Bay to a point on the West Line of the Thos. G. Western Survey, this line also being the East Line of the S. F. Austin Survey; Thence continuing in a Northwesterly direction along said West Shore Line of Galveston Bay, to a point commonly known as "Miller's Point" in said S. F. Austin Survey; Thence West across Moses Lake to a point in the West Shore Line of Moses Lake; Thence continuing in a Southerly and Southwesterly direction along the West Shore Line of Moses Lake, to a point where the West Shore Line of Moses Lake intersects the Center Line of Moses Bayou; Thence in a Westerly direction along the Center Line of Moses Bayou and following its meanders to a point where it intersects the West Right of Way line of the Southern Pacific Railway Company for corner, said corner being in the South Line of the John Lyttle Survey and also in the North Line of the James Smith Survey; Thence Southerly along the West Right of Way line of the Southern Pacific Railway Company to a point of intersection with the South Right of Way Line of Old State

Highway No. 146, also known as the Kemah Road projected Westward for a corner, the same being most Northerly Northwest corner of the existing corporate limits located in the James Smith Survey; Thence in an Easterly direction along said South Right of Way line of old State Highway No. 146 and its Westward projection to a point of intersection with the West Line of Snug Harbor Addition in Texas City Projected Northward to a point for corner; Thence North a distance of 100' to a point for corner in the North Right of Way line of old State Highway No. 146; Thence in an Easterly direction along the North Right of Way line of Old State Highway No. 146 and its Eastward projection to the Point of BEGINNING.

"Section 2. That the additional land and territory so annexed shall be a part of the City of Texas City and the property so added therein shall bear its prorata share of the taxes levied by the City of Texas City. The inhabitants thereof shall be entitled to all the rights and privileges of all the citizens of the City of Texas City and they shall be bound by the acts, ordinances, resolutions, and regulations of the City.

"Section 3. That this ordinance is passed in accordance with Article I, Section 4, Sub-Section "C", of the Charter of the City of Texas City. Upon its introduction in the Commission, it shall be published in the official newspaper one time and shall not there after be finally passed until at least thirty (30) days have elapsed after the date of said publication.